

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARGARET NIEDZWIEDZ</b>	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 230,364; 230,365;
<b>STATE OF KANSAS</b>	)	& 230,366
Respondent	)	
AND	)	
	)	
<b>STATE SELF-INSURANCE FUND</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Both claimant and the respondent appealed the March 11, 1999 Award entered by Administrative Law Judge Robert H. Foerschler. The Appeals Board heard oral argument in Topeka, Kansas, on September 1, 1999.

**APPEARANCES**

Jan L. Fisher of Topeka, Kansas, appeared for the claimant, Margaret Niedzwiedz. Marcia L. Yates of Topeka, Kansas, appeared for the respondent, the State of Kansas, and its insurance fund. Thomas Kelly Ryan of Overland Park, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

In her brief to the Appeals Board, claimant states that she is not claiming any permanent impairment in Docket #230,366, which is a claim for both a December 1993 exposure to tuberculosis and the hepatitis that resulted from treating the disease.

Contrary to the Judge's finding, the Workers Compensation Fund states in its brief to the Appeals Board that it did not withdraw its stipulation that it would be responsible for 70 percent of the benefits due claimant for the March 7, 1992 injury, which is the subject of Docket # 230,365.

### **ISSUES**

Docket #230,364 is a claim for injuries to Ms. Niedzwiedz's left wrist that occurred on March 15, 1990, when a patient kicked her. Docket #230,365 is a claim for injuries to both of Ms. Niedzwiedz's hands and arms that occurred on March 7, 1992, when another patient kicked her during a fight. Docket #230,366 claims benefits for a December 1993 incident in which Ms. Niedzwiedz was exposed to tuberculosis and then adversely reacted to treatment developing hepatitis.

For the March 15, 1990 incident, the Judge awarded Ms. Niedzwiedz 16.44 weeks of temporary total disability benefits but denied her request for permanent disability benefits.

For the March 7, 1992 incident, the Judge awarded Ms. Niedzwiedz 213.62 weeks of temporary total disability benefits followed by 201.38 weeks of permanent partial disability benefits for a 54 percent permanent partial general disability.

Ms. Niedzwiedz contends the Judge erred by failing to award her benefits for a 20.3 percent whole body functional impairment for the March 15, 1990 incident along with permanent total disability benefits for the March 7, 1992 incident.

Conversely, the State of Kansas argues that claimant was still under medical treatment from the first injury when the second injury occurred. Therefore, the State contends the Judge's finding that claimant is only entitled to temporary total disability benefits for the first injury should be affirmed. Regarding the March 7, 1992 injury, the State requests the Appeals Board to affirm the Judge's findings of disability but, as the parties stipulated, find the Workers Compensation Fund responsible for 70 percent of that award.

The Workers Compensation Fund (Fund) contends the Judge erred by finding that it had withdrawn its stipulation of liability. The Fund contends that it is responsible for 70 percent of any award for the March 7, 1992 injury. Other than the issue of its liability, the Fund requests the Appeals Board to affirm the Award.

The issues before the Appeals Board on this appeal are:

1. What is the nature and extent of injury and disability for the March 15, 1990 accident?
2. What is the nature and extent of injury and disability for the March 7, 1992 accident?

3. What is the Workers Compensation Fund's responsibility?

#### FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. In March 1990, Ms. Niedzwiedz was working for the Osawatomie State Hospital as a psychiatric technician. That job required her to work with aggressive and violent adolescents. On March 15, 1990, a patient kicked Ms. Niedzwiedz and fractured the first metacarpal of her left thumb.
2. Ms. Niedzwiedz received treatment from Dr. Lynn D. Ketchum, a board certified plastic surgeon who specializes in treating hands. In July 1990, Dr. Ketchum operated on Ms. Niedzwiedz's left hand and removed a loose bone fragment, smoothed out the joint surface, removed inflamed joint lining, and stabilized the carpometacarpal joint with a tendon transfer.
3. After the surgery, Ms. Niedzwiedz continued to have problems with her left hand. She returned to Dr. Ketchum in January 1991 and was diagnosed with possible early carpal tunnel syndrome on the left. As she had pain and swelling on the opposite side of her left wrist, she saw the doctor in July 1991 and was diagnosed with compensatory synovitis. She again returned to the doctor in January 1992 with left hand and wrist symptoms. An arthrogram indicated that Ms. Niedzwiedz had a torn lunotriquetral ligament, which the doctor believes was probably torn in the March 1990 kicking incident. The doctor then recommended a brace for six weeks, which was to be followed by a cast in the event the brace didn't help.
4. After seeing Dr. Ketchum in January 1992, Ms. Niedzwiedz returned to work with temporary restrictions. On March 7, 1992, Ms. Niedzwiedz was kicked in both hands and arms while she was saving a co-worker, who was being choked by a patient. After that incident, she immediately sought additional treatment from Dr. Ketchum, who saw her on March 9, 1992. At that time, Ms. Niedzwiedz had bruises and pain in both wrists. On March 11, 1992, the doctor casted Ms. Niedzwiedz's left wrist and on June 30, 1992, he released her to return to work.
5. Following the release to return to work, Ms. Niedzwiedz saw Dr. Ketchum numerous times for treatment of both work-related and nonwork-related upper extremity conditions. She saw the doctor during 1993, 1994, 1995, and 1996. After providing additional treatment in January 1993, the doctor noted that Ms. Niedzwiedz should not work in a job where she would be exposed to trauma. After seeing her a final time in March 1998, Dr. Ketchum formulated a final diagnosis, which was:

I. Constrictive tenosynovitis of the flexor tendons for the second and third digits on the right hand.

II. Tendinitis on the dorsal radial aspect of the right wrist both distal and volar forearm, which was caused by overuse and protecting the left hand.

III. Left thumb injuries from 1990.

IV. Distal sympathectomy.

V. Flexor tendon problems.

The doctor believes Ms. Niedzwiedz may eventually need surgery for the trigger fingers and injections for the Dupuytren's contracture and the pisotriquetral arthrosis that she has developed.

6. Using the fourth edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (AMA Guides), Dr. Ketchum rated Ms. Niedzwiedz's right upper extremity at 20 percent and her left upper extremity at 30 percent, which convert to a 29 percent whole body functional impairment. The doctor attributes 70 percent of Ms. Niedzwiedz's impairment to the 1990 injury and 30 percent to the 1992 injury.

7. Using a functional capacity evaluation, Dr. Ketchum formulated Ms. Niedzwiedz's work restrictions and limitations. The doctor believes that Ms. Niedzwiedz should avoid repetitive opposition, forceful opposition, and gripping and pinching motions. She should also limit lifting and handling to 10 to 15 pounds on an occasional basis, and limit fine motor activities such as writing or typing, along with any repetitive or forceful opposition to an occasional basis not to exceed two and one-half hours total in an eight-hour or more workday. The doctor believes that Ms. Niedzwiedz could commute 30 to 40 miles to work and that time would not count against the two and one-half hour restriction as long as she is not gripping the steering wheel tightly. Due to her injuries, it is not safe for Ms. Niedzwiedz to have direct contact with psychiatric patients.

8. According to Ms. Niedzwiedz and the functional capacity evaluation, she last worked for the State of Kansas in December 1994 when it could no longer accommodate her injuries and restrictions. In June 1995, she qualified to receive disability payments from the State. At some point in time, she also began receiving Social Security disability benefits.

9. Using Dr. Ketchum's restrictions, Ms. Niedzwiedz's vocational rehabilitation expert, Bud Langston, testified that she had lost 90-95 percent of her ability to perform work in the open labor market as her injuries limit her to only a partial range of sedentary jobs, which usually require frequent bilateral upper extremity use. In analyzing that loss, Mr. Langston

did not consider the employment opportunities in Olathe, Kansas, which was only 40 miles from Ms. Niedzwiedz's home in Osawatomie, Kansas.

10. Due to the geographic area of her labor market and driving restrictions, Mr. Langston believes Ms. Niedzwiedz is realistically unemployable. He believes Ms. Niedzwiedz's age (she is in her mid-fifties) is a factor against her finding employment. If one expanded the appropriate labor market to the entire State of Kansas, Mr. Langston believes that Ms. Niedzwiedz might be able to obtain a job as a guard checking people in at a desk earning approximately \$6 per hour.

11. The State's vocational rehabilitation expert, Ms. Karen Crist Terrill, analyzed Ms. Niedzwiedz's loss of ability to perform work in the open labor market and testified that she had a 76 percent loss. Ms. Terrill believes Dr. Ketchum's restrictions limited Ms. Niedzwiedz to work falling somewhere between the light and sedentary labor categories. Ms. Terrill testified that the difference in considering and not considering the Olathe labor market represented only a one or two percent difference in the loss analysis. In analyzing the labor market loss, Ms. Terrill concluded that Dr. Ketchum only restricted Ms. Niedzwiedz from gripping activities, which Ms. Terrill believes is done with the fingers, and that the doctor did not restrict Ms. Niedzwiedz from grasping activities, which Ms. Terrill believes is done with the palms of the hands.

12. Ms. Terrill believes Ms. Niedzwiedz retains the ability to work as a receptionist, clerk, administrative assistant, telemarketer, or in a customer-service-type job and that she can earn approximately \$7 per hour.

#### **CONCLUSIONS OF LAW**

1. In docket #230,364, the Appeals Board concludes that Ms. Niedzwiedz sustained a 21 percent functional impairment to the left upper extremity as result of the March 1990 injury. That conclusion is supported by Dr. Ketchum's testimony that Ms. Niedzwiedz now has a 30 percent functional impairment in the left upper extremity, 70 percent of which he relates to the March 15, 1990 incident.

2. In docket #230,365, the Appeals Board concludes that Ms. Niedzwiedz has sustained bilateral upper extremity injuries as a result of the March 7, 1992 incident. Therefore, the permanent partial general disability is determined by considering Ms. Niedzwiedz's loss of ability to perform work in the open labor market and the loss of ability to earn a comparable wage. The Workers Compensation Act provides:

. . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training,

experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.<sup>1</sup>

3. As a result of the March 1992 incident, the Appeals Board finds that Ms. Niedzwiedz has sustained an 84 percent loss of ability to perform work in the open labor market, which is an approximate average of Mr. Langston and Ms. Terrill's labor market loss percentages. There are weaknesses in both expert's opinions and neither is more persuasive than the other. The principle weakness in Mr. Langston's opinion is that he did not consider Olathe in his labor market analysis. The principle weakness in Ms. Terrill's analysis is her belief that Ms. Niedzwiedz has no restriction against grasping activities with her hands.

4. The Appeals Board also finds that Ms. Niedzwiedz retains the ability to work and earn approximately \$6.50 per hour, or \$260 per week. Again, that is an average of the hourly rates provided by the rehabilitation experts. Comparing \$260 to the \$374.99 that Ms. Niedzwiedz was earning at the time of the accident yields a 31 percent loss of ability to earn a comparable wage.

5. Giving equal weight to both the 84 percent loss of ability to perform work in the open labor market and the 31 percent loss of ability to earn a comparable wage, the Appeals Board concludes that Ms. Niedzwiedz has a 58 percent permanent partial general disability due to the March 1992 work-related injury.

#### **AWARD**

**WHEREFORE**, the Appeals Board modifies the March 11, 1999 Award, as follows:

#### **DOCKET #230,364**

Margaret Niedzwiedz is granted compensation from the State of Kansas and the State Self-Insurance Fund for a March 15, 1990 accident and the resulting 21 percent permanent partial disability to the left upper extremity. Based upon an average weekly wage of \$334.44, Ms. Niedzwiedz is entitled to receive 16.44 weeks of temporary total disability benefits at \$222.97 per week, or \$3,665.63, followed by 40.65 weeks of permanent partial disability benefits at \$222.97 per week, or \$9,063.73, making a total award of \$12,729.36, which is all due and owing less any amounts previously paid.

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<sup>1</sup> K.S.A. 1991 Supp. 44-510e(a).

**DOCKET #230,365**

Margaret Niedzwiedz is granted compensation from the State of Kansas and its insurance fund for a March 7, 1992 accident and the resulting 58 percent permanent partial general disability for bilateral upper extremity injuries. Based upon an average weekly wage of \$374.99, Ms. Niedzwiedz is entitled to receive 213.62 weeks of temporary total disability benefits at \$250.01 per week, or \$53,407.14, followed by 201.38 weeks of permanent partial disability benefits at \$145.00 per week, or \$29,200.10, making a total award of \$82,607.24.

As of October 5, 1999, there would be due and owing to the claimant 213.62 weeks of temporary total compensation at \$250.01 per week in the sum of \$53,407.14 plus 181.81 weeks of permanent partial general disability compensation at \$145.00 per week in the sum of \$26,362.45 for a total due and owing of \$79,769.59, which is all due and owing less any amounts previously paid. Thereafter, the remaining balance of \$2,837.65 shall be paid at \$145.00 per week until further order of the Director.

Pursuant to the parties' stipulations, the Workers Compensation Fund is responsible for 70 percent of the Award entered in this docket number.

**DOCKET #230,366**

Margaret Niedzwiedz is granted as compensation the benefits that she has received to date that are reasonable and necessary.

The Appeals Board hereby adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

**DISSENT**

I respectfully disagree with the majority as I would find that Ms. Niedzwiedz is essentially and realistically unemployable as a result of the March 7, 1992 injury. I do not believe the majority realizes the severity of Ms. Niedzwiedz's injuries or that it has realistically considered their effect on her ability to work.

As Ms. Niedzwiedz testified, she is unable to open or carry items with her left hand and her right hand is constricted. Her hands are crippled with pain if she drives more than 45 minutes. Dr. Ketchum's testimony is uncontroverted that Ms. Niedzwiedz developed compensatory synovitis in the left hand trying to protect that hand. Later, she developed swelling in the flexor tendon sheaths in the right wrist as she protected the left hand. Now she has both Dupuytren's contracture that developed as a result of the 1992 trauma and subsequent tendinitis (which I find to be part of the overuse problem that resulted from trying to protect the injured hands) along with trigger finger in the right middle finger that the doctor directly relates to overcompensating for the left. Therefore, her hands are such that she developed additional injury by trying to protect and compensate for them, which is the strongest evidence that Ms. Niedzwiedz is unable to work.

Ms. Niedzwiedz is severely impaired, realistically unemployable and should be entitled to receive permanent total disability benefits.

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BOARD MEMBER

c: Jan L. Fisher, Topeka, KS  
Marcia L. Yates, Topeka, KS  
Thomas Kelly Ryan, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director